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Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,

*Petitioners,*

v.

PRIMARY STEEL, INC.,

*Respondent.*

On Petition for a Writ of Certiorari to  
United States Court of Appeals  
for the Eighth Circuit

**AMICUS CURIAE BRIEF OF  
OVERLAND EXPRESS, INC. IN SUPPORT OF  
PETITIONER MAISLIN INDUSTRIES, U.S.,  
INC., ET AL.**

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### **QUESTION PRESENTED**

In an action to collect freight undercharges by a bankrupt trucking company, is the shipper bound to pay the published rate even where the ICC deems the undercharge action to be an unreasonable practice but has not found the published tariff to be an unreasonable rate?

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**AMICUS CURIAE BRIEF OF  
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**I. INTEREST OF OVERLAND EXPRESS,  
INC. AND ITS OFFICIAL CREDITORS'  
COMMITTEE AS AMICUS CURIAE**

Overland Express, Inc. ("Overland") and its Official Creditors' Committee (the "Committee") submit this brief in support of petitioner Maislin Industries, U.S., Inc., *et al.* ("Maislin") and respectfully request that the Court reverse the decision of the United States Court of Appeals for the Eighth Circuit. *Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc.*, 879 E.2d 400 (8th Cir. 1989). A motor common carrier, Overland filed a petition for relief under Chapter 11 of the United States Bankruptcy Code ("Bankruptcy Code"), 11 U.S.C. §101 *et seq.*, (1982 & Supp. V 1987), on May 5, 1988. Overland's bankruptcy case is pending before United States Bankruptcy Judge Frank J. Otte in the United States Bankruptcy Court for the Southern District of Indiana under case number IP88-3004-RAJ. On August 12, 1988, Overland ceased operations and thereafter began to liquidate its assets. Overland's creditors have filed over one thousand proofs of claim asserting claims totalling almost \$75,000,000.00.

To fulfill their statutory duties to maximize the estate for distribution to creditors, Overland and the Committee obtained bankruptcy court approval to employ auditors to review Overland's billings for errors and undercharges. The auditors have discovered more than \$20,000,000.00 of errors and undercharges in Overland's bills to shippers.

Pursuant to the Motor Carrier Act of 1980 (the "1980 Act"), Congress deregulated the motor carrier industry. Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in 49 U.S.C.). The 1980 Act did not change the requirement that carriers file tariffs with the Interstate Commerce Commission ("ICC"), but the ICC no longer approves carrier tariffs before they become effective. The deregulation of the trucking industry brought about drastic changes. Carriers engaged in competitive pricing and the results were dramatic. In 1987, one commentator estimated that since 1980 approximately 6,500 trucking firms have ceased

to exist.<sup>1</sup> Many of the 6,500 trucking firms that ceased operations filed bankruptcy. Trustees of these bankrupt carriers have sought to collect undercharges in an effort to distribute assets to creditors.<sup>2</sup> *Cf. Breman's Express Co. v. Mitchell Milling Co. (In re Breman's Express Co.)*, 92 Bankr. 636, 644 (Bankr. W.D. Pa. 1988).

In Overland's case, freight undercharges represent a significant asset which can be distributed to Overland's unsecured creditors. The filed rate doctrine is an essential part of the Interstate Commerce Act (the "Act") and has been consistently upheld by this Court. The filed rate doctrine mandates that Overland collect its undercharges. Recent pronouncements by the ICC have cast a cloud over the filed rate doctrine and created equitable defenses for shippers. Overland's attempts to collect undercharges have been impaired by the ICC and by the split of authority among bankruptcy and other federal courts across the country as to whether the filed rate doctrine remains the law. Overland's interest in this case is similar to that of the Petitioner, Maislin, although the magnitude of the undercharges in Overland's case is much greater and not all of Overland's undercharges stem from unpublished or negotiated rates.<sup>3</sup>

<sup>1</sup>Semich, *Are death-valley days over for trucking?*, *Purchasing*, April 23, 1987, at 41.

<sup>2</sup>A recent article estimated that disputed undercharge claims may total \$100 million. MacDonald, *ICC Action Adds New Spin to Ongoing Undercharge Contest*, *Traffic Management*, July 1989, at 15.

<sup>3</sup>This Amicus Curiae Brief is filed with the consent of all parties to this action.

## II. SUMMARY OF THE ARGUMENT

The filed rate doctrine is an essential part of the Act. It has been a pivotal part of the congressional scheme to regulate commerce since 1887. More than eighty years of Supreme Court interpretation of the filed rate doctrine have left a clear understanding of the law. Only published tariffs may be billed and collected. Both carriers and shippers must abide by this rule. No equitable defenses to payment of the published tariff rate exist.

Any deviation from this rule, whether by the ICC or the courts, is contrary to law. The power of the ICC to regulate carriers, including the power to prohibit unreasonable practices, does not abrogate obligations of carriers and shippers under the filed rate doctrine. Although the ICC may alter its administrative practices and policies, it must do so within the parameters of existing law. In changing its interpretations, the ICC, like the courts, is bound by rules of statutory construction. Without specific congressional enactment, the ICC may neither create equitable defenses to the filed rate doctrine nor waive the payment of published tariffs by declaring an action to collect undercharges to be an unreasonable practice. The decision of the Eighth Circuit in *Maislin* in affirming the findings of the ICC was contrary to law and should be reversed by this Court.

In cases involving negotiated rates, shippers can easily protect themselves from undercharges by requiring proof that negotiated rates have been published. When shippers fail to obtain published tariffs for shipments, they incur full liability for payment of undercharges. In the case of a bankrupt carrier, the real parties in interest in an action to collect undercharges are the creditors of the bankrupt carrier and the shipper. In these cases, equity lies with the creditors, not the negligent shipper.

## III. ARGUMENT

### A. THE FILED RATE DOCTRINE IS THE LAW.

#### 1. Publication of Tariffs is Central to the Purpose of the Interstate Commerce Act.

Congressional oversight of interstate commerce is an essential function of our federal government. One of the most important purposes of the Act is the prevention of discriminatory pricing. The filed rate doctrine, 49 U.S.C. §10761, has been the primary means of enforcing the goals of Congress to achieve uniformity in the regulation of interstate commerce. In order to promote equal access to transportation for all shippers, Congress required carriers to publish their rates for respective services and prohibited discounts or rebates of any kind. The only method for a common carrier to change the rate for carrying goods was and still is to file a new tariff.

Section 10761 of the Act requires a carrier to collect the charges mandated by filed tariffs. 49 U.S.C. §10761 (1982). Section 11903 makes a carrier's failure to bill or a shipper's failure to pay in accordance with published tariffs a criminal offense. 49 U.S.C. §11903(a) (1982). This congressional mandate that goods be shipped only in accordance with published tariffs has been consistently supported by decisions of this Court, other courts, and until recently, the ICC.

It is important to note, as did the Court of Appeals for the Seventh Circuit that

Congress did not create a flexible standard for the courts to apply in accordance with the facts, equities and economic realities of the particular case . . . There is no judicial power of equitable reformation of tariffs as of ordinary contracts.

*Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982), *reh'g denied*.

Congressional intent to prohibit secret unpublished tariffs was unequivocal in the original enactment of the Act. S. Rep.

No. 46, 49th Cong., 1st Sess., 179-200 (1886). The Act has been amended numerous times, including the most recent 1980 amendments, but retains this original prohibition. 24 Stat. 380, (1887); 49 U.S.C. §10761(a) (1980). This legislative history underscores congressional intent to retain the filed rate doctrine; yet the ICC has now deemed itself empowered to override the intent of Congress.

## 2. This Court has Consistently Upheld the Validity of the Filed Rate Doctrine.

Beginning with *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, this Court held that Congress had clearly expressed its intention to require carriers to file tariffs and to charge shippers in accordance with the filed tariffs. 204 U.S. 426 (1907). This Court found in *Armour Packing Co. v. United States* "[the Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, that that rate to be, while in force, the only legal rate." 209 U.S. 56, 81 (1908).

The Court reiterated this principle in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915). In *Maxwell*, this Court required a passenger to pay the published tariff in spite of the railroad's mistake in quoting a fare. This Court analogized to the transportation of goods and stated that shippers are presumed to know whether a rate is lawful. *Id.* at 98. The carrier's mistake in quoting the fare did not provide a defense to payment of the published rate. *Id.* In fact, this Court rebuked the Tennessee Supreme Court for attempting to create an equitable defense where the Act did not provide for one. *Id.* *Maxwell* clearly upholds the carrier's right and duty to charge in accordance with the filed tariff.

In *Maxwell*, this Court noted that the filed rate governs unless the ICC finds that the rate is unreasonable. There is a difference between finding that a carrier's published rate or practice is unreasonable under 49 U.S.C. §10701 and finding that a reasonable published tariff may not be collected. The Act permits the former but not the latter. In determining that the

collection of an undercharge is an unreasonable practice, the ICC cannot negate the shipper's obligation to pay the filed rate.

Equitable defenses to an action for payment of the filed rate were rejected in *Louisville & Nashville R.R. v. Central Iron & Coal Co.*, where this Court held the price of shipping goods is fixed by law and no contract can legally reduce that amount. 265 U.S. 59, 65 (1924). "[N]or could any act or omission of the carrier . . . estop or preclude it from enforcing payment of the full amount by a person liable therefor." *Id.* In *Maislin*, the Eighth Circuit Court of Appeals erred by allowing the finding of the ICC that the carrier engaged in an unreasonable practice to preclude the carrier from collecting the published rate.

Almost sixty years after the *Central Iron* decision, this Court reaffirmed the principle that bars the assertion of equitable defenses when a carrier demands payment in accordance with the published rate. *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). The carrier failed to collect all freight charges from the consignee and later sent the consignor a bill for the balance due. The consignor defended by claiming that the carrier had violated ICC regulations by failing to collect the freight charges prior to releasing the goods. The carrier conceded this omission, but claimed that its omission did not provide a defense to payment. This Court looked to the history and purpose of the credit regulations and found that the credit regulations were intended to protect carriers, not to harm them. 456 U.S. at 345. This Court noted that permitting selective defenses to payment would defeat the purposes of the Act — to prevent discriminatory rates and provide equal treatment for shippers. 456 U.S. at 346. The consignor could have protected itself from liability for freight charges by executing the nonrecourse section of the bill of lading. If courts permitted shippers to avoid payment based on credit violations then the nonrecourse clause would be meaningless. 456 U.S. at 351. Significantly, this case was decided after the 1980 Act.

The facts of *Southern Pacific* closely parallel those currently before the Court. Just as the consignor in *Southern Pacific* could have protected itself by executing the nonrecourse provi-

sions of the bill of lading, Primary Steel could have protected itself in this case by requiring Maislin to file a tariff at the agreed rate. Both shippers and carriers are obligated to verify that charges comport with a filed tariff. *Maxwell*, 237 U.S. at 98; 49 U.S.C. §§11901-11903 (1982 and Supp. V 1987). By complying with this requirement, shippers and carriers can simply and inexpensively protect themselves. In fact, attorneys for both shippers and carriers have advised shippers that, while the filed rate doctrine exists, shippers will find the costs of compliance minimal in comparison to the costs of defending undercharge claims.<sup>4</sup>

Recently, this Court considered the filed rate doctrine in *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). In *Square D*, shippers alleged that the rates which had been filed with the ICC constituted a violation of anti-trust laws. The carriers based their defense on the exemption from anti-trust laws under the Act and contended that the filed rates constituted lawful rates and therefore could not violate anti-trust laws. The Court cited *Keogh v. Chicago and Northwestern R.R.*, 260 U.S. 156 (1922), and noted that in *Keogh* the Court found that the ICC's approval of the carriers' rates had established the lawfulness of the rates. This Court explained that even though the ICC no longer approves rates when they are filed, the filed rates constitute lawful rates in the same manner that the rates in *Keogh* were lawful. 476 U.S. at 417.

In determining whether the *Keogh* rule was still a proper interpretation of the law in light of the Reed-Bulwinkle Act and the 1980 Act, this Court concluded that Congress had ample opportunity to reflect on the *Keogh* decision. *Id.* at 419. Congress' refusal to rewrite the law to overturn the *Keogh* decision supported the continued viability of the principle that published reasonable rates are lawful rates. *Id.* The shippers also argued that exempting carriers' rates from anti-trust laws was contrary to congressional intent to deregulate the motor car-

<sup>4</sup>Callari, *Shippers Seek New Law On Balance Due Bills, Traffic Management*, April 1988, at 17; *Take Care Now to Avoid Undercharge Woes, Purchasing*, October 12, 1989, at 29.

rier industry by the 1980 Act. This Court considered that position but concluded,

[I]t nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully re-examined this area of the law in 1980.

476 U.S. at 420 (footnote omitted). Since this Court presumed that Congress agreed with the *Keogh* decision, the use of lawful rates could not support an action for violation of the anti-trust laws.

The *Square D* decision is a strong precedent for reversing the Eighth Circuit in this case. This principle of statutory construction is widely supported. *See, e.g., Kelly v. Robinson*, 479 U.S. 36 (1987). The rule of law that presumes congressional knowledge and approval of prior court interpretations when statutory amendments are made applies in this case. Congress had considered and is currently considering an amendment to the Act which would alter both the filed rate doctrine and the authority of the ICC.<sup>5</sup> While congressional consideration of a proposed amendment should not dictate how this Court interprets existing law, it should provide guidance as to the congressional perception of existing law.

The filed rate doctrine has been the law for more than eighty years. It has withstood judicial construction and congressional amendments, yet remains intact. Although some courts have considered it a harsh rule, the filed rate doctrine is the law until changed by Congress. In order to affirm the *Maislin* decision, this Court would have to reverse a long line of consistent statutory construction. Such a result is untenable.

<sup>5</sup>H.R. 3243, 101st Cong., 1st Sess. (1989), is now pending before the Surface Transportation Subcommittee of the House Committee on Public Works and Transportation of the United States House of Representatives.

### 3. Only Congress May Change the Filed Rate Doctrine.

In October, 1986, the ICC issued its advisory opinion in *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, Ex Parte No. MC-177 ("Negotiated Rates I") which determined that the ICC has primary jurisdiction to determine whether a carrier's collection of undercharges is an unreasonable practice under 49 U.S.C. §10701. 3 I.C.C.2d 99 (1986). This opinion was amended by the ICC in June, 1989, *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, Ex Parte No. MC-177 ("Negotiated Rates II"), 5 I.C.C.2d 623 (1989). The ICC's position in *Negotiated Rates I* and *II* ignores the rules of statutory construction and by the ICC's own admission represents a drastic reversal of prior policy.

These edicts by the ICC were not prompted by any new direction from Congress, but by the ICC's perception of changing price structures and competitiveness in the trucking industry. 3 I.C.C.2d at 104. According to the decision of this Court in *American Trucking Associations v. Atchison, Topeka, & Santa Fe R.R.*, 387 U.S. 367 (1967), an administrative agency can change its practices in light of new developments. While the ICC may have the power to regulate and to change its administrative policies within the framework of existing law, it may not avoid its duty to uphold the Act, including the filed rate doctrine. It may not prefer one section of the Act to the exclusion of another. The dramatic change espoused in *Negotiated Rates I* and *II* without corresponding change in the underlying statutes constitutes a usurpation by the ICC of congressional authority.

The *Maislin* court upheld the decision of the ICC, based on its policy as announced in *Negotiated Rates I*, finding collection of undercharges by Maislin was an unreasonable practice under 49 U.S.C. §10701 and that Primary Steel need not pay the published rate for shipments made. 879 F.2d at 400, 406.

In *Caravan Refrigerated Cargo, Inc.*, the United States Court of Appeals for the Fifth Circuit held that even if the ICC

finds that a carrier engaged in an unreasonable practice, neither the ICC nor a court has authority to prevent collection of valid published tariffs. *Supreme Beef Processors, Inc. v. Yaquinto (In re Caravan Refrigerated Cargo, Inc.)*, 864 F.2d 388, 394 (5th Cir. 1989) *reh'g and reh'g en banc denied, petition for cert. pending*, No. 88-1958. This is the better reasoned view.

While there can be no doubt the ICC is fully empowered to determine the reasonableness of carrier rates and practices under 49 U.S.C. §10701, this power does not extend to allow the ICC to permit a shipper to pay less than the published rate. Even where a negotiated rate is clearly established as in *Maislin*, the shipper may not escape its obligation under the filed rate doctrine. To hold otherwise creates a defense for the shipper without legal basis. It subverts the policy of providing equal access to transportation. It gives the shipper a cause of action for the carrier's unreasonable practice, when the Act does not contemplate one. Congress opted in the 1980 Act to retain the filed rate doctrine. Rather than create a private cause of action for carrier violations and unreasonable practices, Congress chose to give the ICC broad regulatory and enforcement powers.

The practical result of the decision by the Eighth Circuit in *Maislin* would be to allow carriers and shippers to make the filed rate doctrine a nullity by simply negotiating an unpublished rate. If the competitive pricing structure of the trucking industry warrant this, then Congress, not the ICC, must enact new laws. Until Congress changes 49 U.S.C. §10761, carriers, shippers, the ICC, and the courts must abide by the law. If an equitable defense to collection of a published tariff is to be permitted, this defense must have a statutory basis.

**B. THE ICC MAY NOT USE A FINDING OF UNREASONABLE PRACTICE TO ABROGATE THE FILED RATE DOCTRINE.**

**1. The ICC has Limited Adjudicatory Powers.**

Recently, the ICC has taken an active role in adjudicating matters pertaining to freight undercharge disputes.<sup>6</sup> These cases have traditionally come before the ICC by referral from district and bankruptcy courts under the doctrine of primary jurisdiction. More recently, such actions have been commenced by petition of a shipper based on the policy announced by the ICC in *Negotiated Rates II* which authorizes adjudication by the ICC without court referral. 5 I.C.C.2d 623 (1989). Just as this Court held that mere reference to "tariff construction" is not "determinative on the jurisdictional issue," so too, should it hold that mere reference to "reasonableness" of billing practices and tariffs is not outcome determinative in this or similar cases. *United States v. Western Pac. R.R.* 352 U.S. 59, 68-69 (1956).

The ICC has limited jurisdiction and no plenary power to fashion remedies. *Southwestern Elec. Power Co. v. Burlington Northern, Inc.*, 475 F. Supp. 510, 520 (E.D. Tex. 1979). Even the ICC admits in both *Negotiated Rates I* and *II* that it has no power to grant a remedy, only to determine "reasonableness" issues:

The Commission has no authority to award damages. Only the courts can grant a remedy.

3 I.C.C.2d 99, 101 (1986).

We now see that our 'advisory opinion' language may have been a source of confusion and requires clarification. It was used only to illustrate that this agency's unreasonable practice finding in certain instances

<sup>6</sup>The number of cases now pending or recently decided is too great to permit citation. See Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, No. 89-64, October 16, 1989, App. D-H. In none of these cases has the ICC ruled in favor of a carrier.

may not be self-enforcing (since the courts, not the Commission, have the more narrower [sic] authority to order or deny payment of undercharges in a particular case), and would be issued only in response to a court referral of the unreasonable practice issue.

5 I.C.C.2d 623 (1989).

Yet, the ICC has created an equitable defense to the filed rate doctrine under its interpretation of 49 U.S.C. §10701 and has created a remedy for the shipper by declaring that the carrier's unreasonable practice prevents collection of the filed rate. This was the result in *Maislin*.

In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Primary Steel to pay undercharges for the difference between the negotiated rates and the tariff rates.

*Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al.*, No. MC-C-10961 (ICC), January 12, 1988; Appendix C to Petition for Certiorari at 44a.

Both the ICC and the *Maislin* court claim this result does not abolish the filed rate doctrine. The clear effect is to use one section of the Act (49 U.S.C. §10701) to nullify another (49 U.S.C. §10761). The tension and potential for conflicting interpretations has been noted by other courts. See, e.g., *Carriers Traffic Serv., Inc. v. Anderson Clayton & Co.*, 881 F.2d 475, 482 (7th Cir. 1989).

[A] finding of negotiated rates should not automatically signal the follow-up conclusion of unreasonable carrier practices. Such reasoning would permit shippers and carriers to avoid the filed rate doctrine simply by agreeing on a rate. The filed tariffs could largely be ignored. This line of thought takes 49 U.S.C. §§10701(a) and 10704 beyond their intended purpose and undercuts the vitality of 49 U.S.C. §10761(a), which is clearly contrary to the law.

*Pongetti v. Baldor Elec. Co. (In re Robinson Truck Lines, Inc.)*, 89 Bankr. 584, 592 (Bankr. N.D. Miss. 1988).

This Court previously faced an attempt to create a cause of action for shippers where the Act provided none. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). The Court's analysis of legislative history and congressional intent where part, but not all, of the relevant portions of the Act were amended is directly applicable to this case in light of the 1980 Act. It may be that the result here will lead to future legislative action just as the Act was amended after *T.I.M.E.* See Pub. L. No. 89-170, 79 Stat. 651, 651-652 (1965). If there is to be a change; so be it. However, Congress, not the ICC or the courts, must make such a change.

## 2. The ICC's Opinion in *Negotiated Rates* Violates Rules of Statutory Construction.

If the goal is as the ICC suggests to "harmonize" two provisions of the Act, the usual and customary rules of statutory construction should apply. Where two parts of the same statute appear to conflict, the more specific portion controls over the more general. As one court noted, the broad rule giving the ICC the power to regulate unreasonable practices cannot control the specific rule requiring adherence to the filed rate doctrine.

Congress has given the ICC broad authority to regulate carrier practices, but Congress itself has enacted a key regulation — the rule that the filed rate controls.

*Still v. Salem Carpet Mills, Inc. (In re Southwest Equipment Rental, Inc.)*, 103 Bankr. 908, 910 (Bankr. E.D. Tenn. 1989).

The importance of this rule of statutory construction was reaffirmed in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S.Ct. 680 (1990). This Court refused to permit a general section of the Labor-Management Reporting and Disclosure Act of 1959 to override a specific prohibition against alienation of pension benefits contained in the Employee

Retirement Income Security Act of 1974. An exception to the prohibition where Congress had created none could not be upheld by this Court. 110 S.Ct. at 687. *Guidry* demonstrates that a policy choice made by Congress may not seem fair, but in light of clear congressional choice the courts must defer.

The ICC's use of the unreasonable practice section of the Act has given shippers a defense to the payment of filed rates when both Congress and this Court have said no defenses exist. In *Southern Pacific*, this Court refused to permit the carrier's violation of ICC credit regulations to create a defense to the payment of freight charges. This Court was concerned that permitting selective equitable defenses would abrogate the entire rule. 456 U.S. at 352. See also *Guidry*, 110 S.Ct. at 687. The ICC's unreasonable practice findings provide shippers with a method of avoiding compliance with filed tariffs. This is in violation of the clear intent of section 10761 which provides no defenses to payment of the published tariff.

The general rulemaking authority delegated by Congress to an administrative agency can never be the basis for allowing that agency to make a rule which prohibits a practice which is mandated by the same statute. *Southwestern Equipment*, 103 Bankr. at 910; see also *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986).

Another important consideration is that the 1980 Act modified the authority of the ICC to grant relief from the filed rate doctrine to contract carriers. 49 U.S.C. §10761(b) (1982). Under this provision, the ICC may grant relief from the strictures of 49 U.S.C. §10761(a) only to *contract* carriers.

Having given the ICC statutory authority to grant relief from the filed rate statute for contract carriers only, Congress must be presumed to have decided that the other changes made in the law by the 1980 Act did not justify giving the ICC the authority to alter the operation of the filed rate statute between common carriers and their customers.

*Southwestern Equipment*, supra at 910, citing, *In re Caravan Refrigerated Cargo*, 864 F.2d 388 (5th Cir. 1989); *Rebel Motor Freight v. Southern Beverage Co.*, 673 F.Supp. 785 (M.D.La. 1987). This distinction between common and contract carriers indicated Congress did not intend to overrule the filed rate doctrine.

A final point about congressional intent and statutory interpretation by the ICC under *Negotiated Rates II* was made in *Southwestern Equipment*. 103 Bankr. at 911. Under 49 U.S.C. §10762(d) the ICC now has authority to shorten the notice period for making a tariff effective after its date of publication from thirty days to one day.

The reason for shortening the notice period appears obvious. The period was shortened so that carriers and shippers can negotiate rates for immediate shipping and still abide by the filed rate statute.

*Id.* at 911. See also 49 C.F.R. §1312.4(e) (1988).

In the absence of clear congressional intent, courts and administrative agencies should be loathe to make sweeping changes in statutory interpretation. Even though the ICC may have considerable latitude to alter its policies and regulations, courts must abide by the law and enforce the filed rate doctrine under 49 U.S.C. §10761.

### C. THE ICC'S OPINION IN NEGOTIATED RATES CONFLICTS WITH THE BANKRUPTCY CODE.

The basic dispute underlying the collection of a freight undercharge is the allocation of the burden for failing to comply with the law. Both the shipper and the carrier are obligated to see that tariffs are filed and abided by.

Civil and criminal penalties apply to *any person* who "knowingly offers, grants, gives, solicits, accepts, or receives" transportation services at rates less than the published tariffs. 49 U.S.C. §§11901, 11902, 11903 (1982 & Supp. V 1987). The fact that the filed rate doctrine is still an important part of the Act is

apparent in the fines and penalties that may be imposed for violations of it. Since both shippers and carriers are subject to these obligations, if tariffs are not filed or published rates are not charged and paid, who should bear the responsibility?

Most operating carriers do not attempt to collect undercharges, even for clerical errors, for fear of alienating shippers and losing business.<sup>7</sup> In most cases, it is a bankruptcy trustee<sup>8</sup> who discovers that published tariff rates have not been billed or paid. It is the creditors, usually unsecured creditors, who bear the economic burden of the illegal bargain between shipper and carrier.

Even if the ICC determines that a carrier has engaged in an unreasonable billing practice, the ICC lacks authority to grant a waiver of undercharges as a remedy for the shipper. In the case of a bankrupt carrier, the trustee must collect any undercharges which are due from shippers. A bankruptcy trustee is a fiduciary with respect to creditors and has a duty to maximize the bankruptcy estate. Under the Bankruptcy Code, the trustee is obligated "to collect and reduce to money the property of the estate." 11 U.S.C. §704 (Supp V 1987); 11 U.S.C. §§1106, 1107 (1982 & Supp V 1987). This is the primary obligation of the trustee. Under 11 U.S.C. §541 (1982 & Supp V 1987), a cause of action is property of the estate. As a result, the real parties in interest in most cases, including *Maislin*, are the creditors of the bankrupt carrier and the shipper. The ICC's policies in *Negotiated Rates I* and *II* fail to account for this. The ICC has allocated the burden for abiding by the filed rate doctrine entirely to the carrier. Shippers are the parties who have the most direct economic interest to protect and who can most easily prevent an undercharge claim. Shippers should not be excused from paying the published rate.

Because shippers can so easily protect themselves from undercharge claims, it is particularly inequitable to allow them

<sup>7</sup>Shippers do, however, collect overcharges from operating carriers.

<sup>8</sup>Under the Bankruptcy Code, a debtor-in-possession has the same duties and responsibilities as a trustee. 11 U.S.C. §§1107, 1108.

to reap the benefit of paying less than the filed rate, while ordinary trade creditors of the bankrupt carrier go unpaid. A shipper who allows repeated shipments, sometimes over a period of years, to be made without obtaining and verifying that the rate has been duly published does not have equity on its side. Rates may now be published on one day's notice. 49 U.S.C. §10762(d) (1982); 49 CFR §1312.4(e) (1988).

Many of the undercharge cases heard or pending in district and bankruptcy courts involve large, sophisticated shippers with considerable economic clout to negotiate favorable rates. Primary Steel was such a shipper. This case, like so many others, is not a case of one side obtaining an unfair advantage, but a case of an illicit bargain between a shipper and a carrier who both knew or should have known they were operating under an unpublished tariff. Neither party may equitably use the other's conduct or "unreasonable" practice to excuse its own failure. A shipper who does not obtain a published tariff after negotiating a rate is liable for the published rate. If equity determines the outcome in these cases, it lies with the creditors of bankrupt carriers, not with a shipper who could have easily prevented the undercharges but instead participated in the negotiation of unpublished rates and knew or should have known it was paying less than the filed rate.

#### IV. CONCLUSION

The difficulty with both the ICC advisory opinions in *Negotiated Rates I* and *II* and the *Maislin* decision is that they go too far. A negotiated rate is not always an unreasonable practice, nor is an action to collect undercharges. Even where a carrier engages in a practice deemed to be unreasonable, the shipper remains obligated to pay the published rate. Allowing the shipper to receive a windfall at the expense of the creditors of a bankrupt carrier places the burden for noncompliance on the wrong parties.

The question of whether the filed rate doctrine should exist in an era of deregulation is a question for Congress. The Court

cannot make policy or shape legislation; it is the judicial branch of a tripartite government. The ICC cannot change the law or reallocate the burden of noncompliance with the law. It is a creature of the executive branch designed to implement the policy choices of Congress. Only Congress has the constitutional power to alter the filed rate doctrine, whether by eliminating it or creating an equitable defense to it. Congress has not yet done this. Until Congress amends the Interstate Commerce Act, the choice for the judicial and executive branches is clear; the filed rate doctrine remains the law without exception.

For all of the foregoing reasons, Overland Express, Inc. and its Official Creditors' Committee as amicus curiae to *Maislin* pray that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit in *Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc.*

Respectfully submitted,

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